Supreme Court, U.S.
FILED
MAR 5 1991
OFFICE OF THE CLERK

No. 90-1194

In The

Supreme Court of the United States

October Term, 1990

MAINE PUBLIC UTILITIES COMMISSION,

Petitioner,

v.

MAINE YANKEE ATOMIC POWER COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Maine

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: March 5, 1991

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In its Brief in Opposition, Maine Yankee Atomic Power Company ("Maine Yankee") raises what appears to be two new issues. Both are merely exercises in circular logic designed to divert attention away from the important issue presented by the Maine Public Utilities Commission ("MPUC") petition.

First, Maine Yankee argues that the petition by the MPUC is a collateral attack upon a FERC rate order. This assertion assumes that decommissioning expenses are rates and not costs reflected in rates. That, of course, is the very issue before this Court. If decommissioning expenses are costs, then they may change without FERC approval and the fact that they change is not a collateral attack upon any rate order. State action may cause labor costs to increase, state taxes to increase, insurance costs or environmental regulation compliance costs to increase; however, none of these can be considered a collateral attack on a FERC order.

The MPUC *is* attacking a federal constitutional ruling by the Maine Supreme Court that decommissioning expenses are rates and not costs and that, therefore, the State is preempted from setting decommissioning funding levels. Should this Court overturn that constitutional determination, it would have no effect on existing FERC rates or past rate orders. The MPUC would expect, however, that future rate orders would take into account any change in Maine Yankee's decommissioning costs.

Maine Yankee alleges that the MPUC "question[s] the jurisdiction of FERC to fix Maine Yankee's decommissioning funding levels and the validity of FERC's classification of decommissioning expenses as a stated rate." *Brief in Opposition* at 25. As noted above, the MPUC fully expects future FERC rate orders to "fix" the amount and treatment of decommissioning costs reflected in the rates. That is FERC's job and the MPUC does not question its authority to do it. As a cost of doing business, decommissioning funding levels will continue to be reflected in rates as the FERC deems proper, just as every other cost from State taxes to nuclear fuel is reflected.

Nor does the State challenge FERC's authority to classify such costs in any manner it pleases, putting them into formula or stated rate categories for the purposes of rate regulation and administration. The MPUC *does* challenge the ruling of the Maine Supreme Court that such classification has any bearing upon the State's authority to impose those costs. Under the Maine Court's reasoning, the State would lose its ability to tax without FERC approval if FERC were to declare State taxes part of a stated rather than formula rate. It is that reasoning which the MPUC challenges, not FERC's authority to classify costs. There is no collateral attack upon any FERC order involved in this appeal.

Maine Yankee also asserts that the Maine Court's recitation of one of the preamble provisions to the NDFA (35-A M.R.S.A. § 4351) mentioning that proper decommissioning is essential to protect public health, safety and the environment, constitutes a "finding" by the Maine Court that the State Law in question is health and safety regulation, and that that finding is binding upon this

Court. First, it is not clear that the Maine Court made any such "finding." The Maine Court clearly found the NDFA preempted by the FERC's determination of decommissioning costs, and yet the FERC has no more authority to regulate the health and safety of nuclear power than do the States. Second, even if the Maine Court had made such a finding, that "finding" would be a constitutional determination that decommissioning funding is "safety" regulation delegated by Congress to the federal government. The Maine Court's decision is not a matter of state statutory interpretation to which this Court must pay deference but a matter of federal constitutional interpretation which is clearly at odds with this Court's ruling in *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190 (1983). The Maine Court's constitutional determination is erroneous and should be corrected by this Court.

Both arguments by Maine Yankee attempt to obscure the simple, straightforward and important question presented in MPUC's petition: has Congress intended that ratemaking agencies have exclusive jurisdiction to set site-specific decommissioning funding requirements?

The principle at issue before the Court today is one of broad and general applicability which, when established, will clearly define the respective authority of every regulatory agency, both state and federal, with regard to the financial planning for the decommissioning of every nuclear power facility in this nation. The principle that the state within which a nuclear plant is located should have the authority to financially plan for the decommissioning of that facility in conformance with Nuclear Regulatory Commission (NRC) rules is unambiguously and

equally applicable to every such nuclear facility operating now or to be constructed in the future. It is a principle that applies sound constitutional reasoning to establish uniformity and logic in an area which now is fragmented by the accidental distinctions of corporate organization and historic whimsy, distinctions that scatter authority among various jurisdictions in a manner which bears no rational relation to the problems presented or the interests meant to be protected by the decommissioning process. The NRC rules and regulations do not differ depending upon whether the facility in question sells at wholesale or retail. There is no physical difference between waste generated for wholesale or retail production. The interests of the States in proper decommissioning is indifferent to such a distinction. There is no rational or constitutional reason why state authority should hinge on such a distinction.

CONCLUSION

For the reasons stated herein and in the Petition For A Writ Of Certiorari, certiorari should be granted in this case.

Respectfully submitted,

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